IN THE

Supreme Court of the United States

October Term, 1942. No. 428

O. M. TATE, JR., TRUSTEE IN BANKRUPTCY OF POST AND COMPANY, a co-partnership consisting of FRED S. POST, MARY POST WILLIAMS, HELEN POST MORRIS and MRS. FRANK H. POST (MARTHA L. POST),

Petitioner

vs.

ROSE McCABE HOOVER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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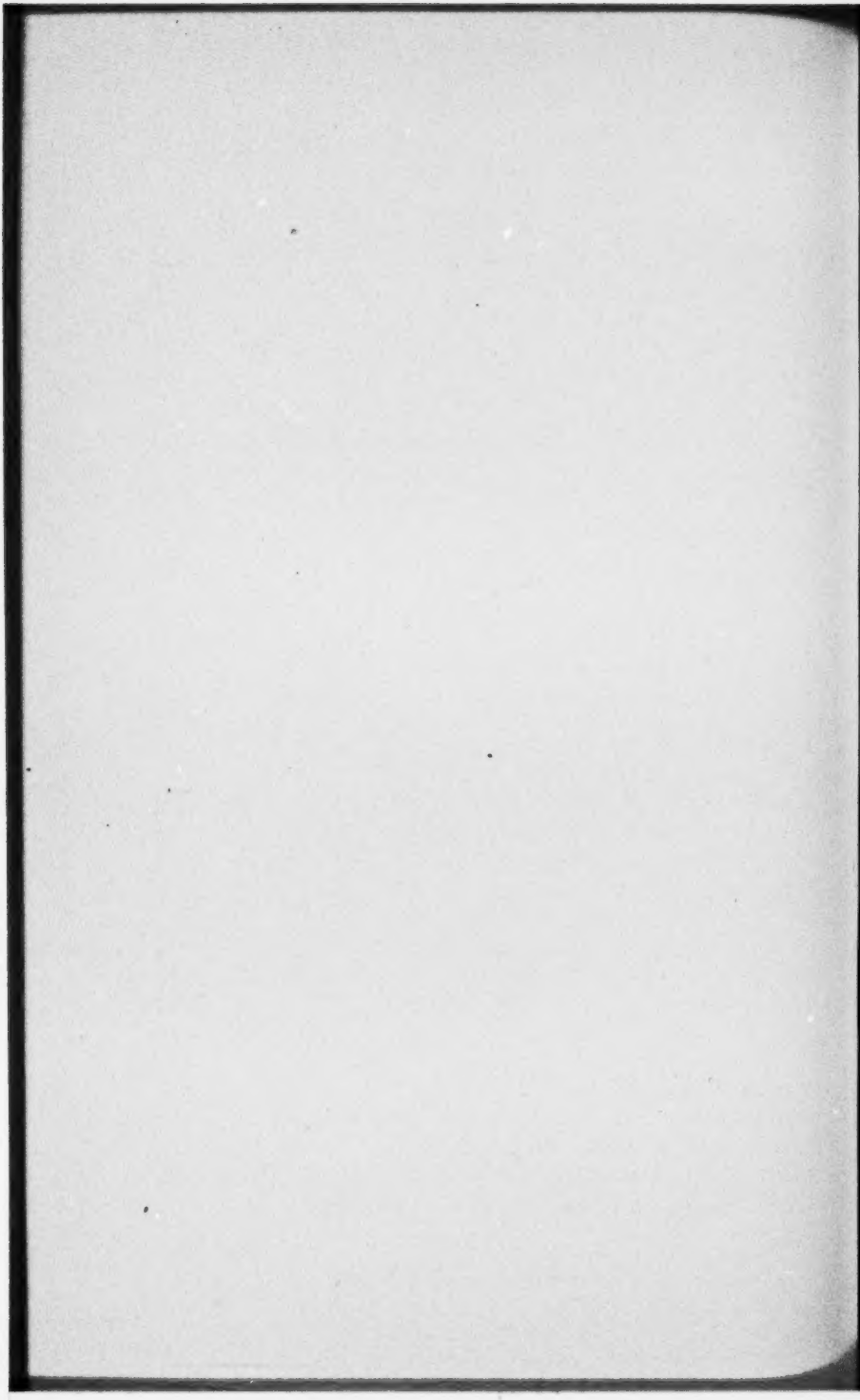

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable the Chief Justices and the Associate Justices of the Supreme Court of the United States:

Your petitioner, O. M. Tate, Jr., Trustee in Bankruptcy of Post and Company, a co-partnership consisting of Fred S. Post, Mary Post Williams, Helen Post Morris and Mrs. Frank H. Post (Martha L. Post), respectfully prays this Court for the issuance of a Writ of Certiorari to the Supreme Court of Pennsylvania to review a final judgment of that Court entered on May 27, 1942, rehearing denied June 29, 1942, reversing judgment of the Court of Common Pleas of Luzerne County, Pennsylvania, entered on December 31, 1941.

OPINIONS BELOW.

The Opinion of the Court of Common Pleas, (R. pp. 249a-276a, 298a-302a) is not reported. The opinion of the Supreme Court of Pennsylvania (R. pp. .....) is reported in 345 Pa. State Reports, Page 19, 26 Atl. 2nd, 665.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania, which petitioner seeks to have reviewed, was filed May

27, 1942. Petition for rehearing was denied June 29, 1942, (R. p. ....).

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended, 28 U. S. C. 344.

THE STATUTE INVOLVED.

The statute involved is the Bankruptcy Act of 1898, Sec. 5, July 1, 1898 c. 541, Sec. 5, 30 Stat. 547, 11 U.S.C. Sec. 23; and Sec. 70, July 1, 1898 c. 541, Sec. 70, 30 Stat. 565; Feb. 5, 1903, c. 487, Sec. 16, 32 Stat. 800; May 27, 1926, c. 406, Sec. 16, 44 Stat. 667, 11 U.S.C. Sec. 110.

Said sections of the Bankruptcy Act are printed in the appendix, infra, pages 19-22.

QUESTIONS PRESENTED.

The question is:

Whether title to individual real estate of a partner vests in the Trustee in Bankruptcy of the partnership as of the date the petition in bankruptcy is filed against the partnership, so that thereafter said partner cannot convey valid title thereto to a person other than a bona fide purchaser for value without notice?

The Supreme Court of Pennsylvania answered in the negative.

STATEMENT.

In 1933 and for many years previous, Fred S. Post, Mary Post Williams, Helen Post Morris and Mrs. Frank H. Post, (Martha L. Post), had been co-partners, trading as Post and Company in the City of Knoxville, Tennessee. The active partner was Fred S. Post. In the summer of 1933 the firm got into financial difficulty, a judgment being entered against it, and in November Fred S. Post advised his partners, including Martha L. Post, that bankruptcy was imminent (R. p. 212a). At that time Martha L. Post owned individually the real estate involved in this case located in West Pittston, Luzerne County, Penna., and 58 shares of stock in the First National Bank of Pittston. After learning of the imminent bankruptcy of Post and Company, she consulted a lawyer in Knoxville, Tennessee, and thereafter, on November 16, 1933, assigned the stock to her niece, Lucy McCabe Richards, and by deed dated December 1, 1933, attempted to convey the real estate to the Respondent. This was done to "save" her property from the creditors of Post and Company (R. p. 212a). The Respondent knew of the bankruptcy (R. p. 127a), and knew the purpose of the transfer (R. p. 126a). The conveyance of the real estate preserved a life estate in Martha L. Post and was made without actual consideration (R. p. 257a).

On November 27, 1933, four days before the execution of the deed to the Respondent, petition in bankruptcy was filed against the partnership and against Fred S. Post, individually, in the District Court of the United States for the Eastern District of Tennessee, Northern Division, to No. 7434 in Bankruptcy. On the same day an Answer was

filed for the partnership by Fred S. Post, admitting insolvency and inability to pay its debts. A Receiver was appointed and on December 19, 1933, the partnership was duly adjudicated bankrupt. On January 4, 1934, Sam Huffaker was elected Trustee and qualified as such. A lawyer, Neal B. Spahr, repeatedly appeared at hearings as "attorney for the bankrupts" (R. p. 307a). In the course of the administration of the estate of Post and Company, claims of unsecured creditors were filed and allowed in the sum of $19,515.74 (R. p. 309a). Dividends aggregating 14.072% were allowed and paid leaving a balance due and payable to unsecured creditors of $16,769.52. On February 7, 1935, the final account of the Trustee was approved and the Trustee discharged.

Martha L. Post died testate on January 7, 1935 and said Helen Post Morris was appointed Administratrix c.t.a. (R. p. 310a). In the administration of her estate there was a balance of $1305.42 for distribution to the creditors of Post and Company and the Administratrix has agreed to turn this sum over to the Trustee of Post and Company (R. p. 213a). Neither the real estate here involved nor the bank stock were administered as assets of the decedent's estate.

Several months later, about August, 1935, it came to the knowledge of the Reconstruction Finance Corporation, a creditor of Post and Company, that said partner, Martha L. Post, had been the owner of the real estate involved in this case and that a deed for said property, dated December 1, 1933, purporting to convey the real estate to her niece, Rose McCabe Hoover, the Respondent, had been recorded in Luzerne County on December 6, 1933. It was also discovered that the said Martha L. Post had been the owner of the shares of bank stock referred to above and had assigned the same to another niece, Lucy McCabe Richards, on November 16, 1933.

Statement

On November 9, 1935, the Reconstruction Finance Corporation filed a petition in the District Court of the United States for the Eastern District of Tennessee setting forth that these conveyances had been made, averring that they were in fraud of creditors and asking that the bankruptcy proceedings be reopened and that action be taken to recover the said property for the benefit of creditors. An order was duly entered reopening the case and at a meeting of creditors on November 21, 1935, the petitioner was elected Trustee and an Order was made by the Referee authorizing and directing the Trustee to institute proceedings for the recovery of the said real estate and of the bank stock. Thereupon, the Trustee commenced this suit on December 30, 1935 for the recovery of the real estate and instituted a separate action for the recovery of the bank stock. There was no ancillary administration of the estate of Martha L. Post, deceased, in Luzerne County, Pennsylvania, and no suit was started by the petitioner herein against that estate.

This suit was started by Bill in Equity against Rose McCabe Hoover, the Respondent, praying for a Decree that title to the real estate involved in this case be declared to have vested in the Trustee in Bankruptcy of Post and Company as of November 27, 1933, the date upon which petition in bankruptcy was filed against Post and Company, and that the deed from Martha L. Post to the Respondent be declared fraudulent, null and void as to the creditors of Post and Company and as to the petitioner (R. p. 53a). The husband of the Respondent, Harry C. Hoover, and Socony Vacuum Oil Company, were later added as defendants by amendment. Preliminary objections to the Bill in Equity were filed and dismissed. Answers were filed by the Respondent and the other Defendants. After trial before Hon. John S. Fine, the Bill was dismissed as to Harry C. Hoover, (who has since died), and the Socony

Vacuum Oil Company, lessee of the premises from the Respondent, and a Decree was entered adjudging that the conveyance of said real estate to the Respondent, Rose McCabe Hoover, was null and void, that title to said real estate vested in the Trustee in Bankruptcy of Post and Company as of November 27, 1933, and directing that the Respondent, Rose McCabe Hoover, account for rents received. Exceptions to this decree were filed by the Respondent and were overruled by the Court en banc of Luzerne County. Thereupon, the Respondent appealed from the Final Decree of the Court of Common Pleas to the Supreme Court of Pennsylvania and after argument, the Supreme Court of Pennsylvania reversed the Decree of the Court of Common Pleas at the cost of the petitioner. Petition for rehearing was duly filed by the petitioner and rehearing was denied by Order dated June 29, 1942 (R. pp. .....).

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Pennsylvania erred:

1. In holding that upon adjudication of a partnership as bankrupt, only the assets of the partnership vest in the trustee in bankruptcy as of the date of the filing of the petition in bankruptcy against the partnership, and not the assets of the individual partners.

2. In holding that a member of a bankrupt partnership may convey his property to a third person having knowledge of the bankruptcy proceedings without consideration for the purpose of placing such property beyond the reach of the creditors of the partnership and that the Bankruptcy Act affords the trustee in bankruptcy of the partnership no remedy for the recovery of such property from the grantee thereof.

3. In holding that the only remedy available to partnership creditors for the recovery of property of a partner which has been transferred after the bankruptcy of the partnership is to bring separate proceedings in equity against the partner and the transferee to set aside the transfer as fraudulent.

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant the writ requested is invoked because the Supreme Court of Pennsylvania has decided important questions of federal law in conflict with applicable decisions of this Court and of other federal courts.

I.

In deciding the case at bar the Supreme Court of Pennsylvania said:

> "The pivotal question is whether by virtue of the provisions of Section 5 of the Bankruptcy Act of 1898, 11 U.S.C.A., sec. 23, the title to the separate estate of an alleged partner vests in the trustee upon the filing of an involuntary petition later granted praying for the adjudication as a bankrupt of the partnership alone, where 'the petition and subpoena' or other process was never served upon the alleged partner either in the partnership proceedings or in any individual proceedings."

The Court answered this question in the negative and on the basis of its answer, reversed the Court of Common Pleas and directed judgment to be entered in favor of the Respondent. Various other aspects of the case were discussed by the Court but its decision was clearly based on its opinion that title to the individual property of a partner does not pass to the trustee in bankruptcy of a partnership as of the date when a petition in bankruptcy is filed against the partnership. The membership of Mar-

tha L. Post in the partnership of Post and Company was not only established by the Petitioner's evidence but was admitted by the Respondent (R. pp. 128a, 129a). That she had knowledge of the bankruptcy proceedings at the time they were commenced and made no objection to the proceedings was also established (R. pp. 204a, 216a). As a matter of fact, the record clearly shows that the purpose of the conveyance sought to be set aside was to place the property in question beyond the reach of the creditors of Post and Company (R. pp. 115a-130a; 137a-146a).

If the Court below had decided that title to Mrs. Post's property passed to the trustee of Post and Company when bankruptcy proceedings were started against the firm, ultimate recovery of the property by the trustee would be inevitable. Any defects in procedure or pleading could be corrected by amendment or even by the commencement of a new action. We respectfully submit, therefore, that this case was decided by the Court below solely on the basis of its answer to the federal question involved, to wit: Does title to the property of a partner pass to the trustee in bankruptcy of a partnership as of the date when petition in bankruptcy is filed against the partnership?

II.

The decision of the lower Court on the above question is in conflict with the express provisions of Section 5 and Section 70 of the Bankruptcy Act of 1898, with the decision of this Court in *Francis v. McNeal,* 228 U. S. 695, and with the decisions of the Federal Courts and State Courts to which reference is hereinafter made.

Section 5 of the Bankruptcy Act of 1898 provides, inter alia, that a partnership may be adjudged a bankrupt as a separate entity. It also provides that "The Court of

Bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

The decision of this Court in *Francis vs. McNeal, supra,* was based upon the provisions of Section 5 of the Bankruptcy Act. The case was before the Court on appeal from the Circuit Court of Appeals for the Third Circuit. The decision of the Circuit Court of Appeals is reported in 186 Fed. 481.

In that case the partnership and two of its three members had been adjudged bankrupt. The Trustee in Bankruptcy of the partnership petitioned the Bankruptcy Court for an order on the partner who had not been adjudicated to deliver his property to the Trustee for the purpose of administration. The unadjudicated partner contended that since he had not individually been adjudged a bankrupt his estate could not be administered in bankruptcy. The Circuit Court of Appeals held that a partnership is an entity which may be adjudged a bankrupt irrespective of an adjudication against any of its members and also held that the above sections of the Bankruptcy Act clearly provide for the administration of partnership and individual property by the Trustee of a bankrupt partnership. The Court also held that Subsection (h) of Section 5 applied only where the partnership itself was not adjudicated bankrupt but some, not all, of the partners had been adjudicated. The Court thereupon overruled all of the defendant's contentions and affirmed the Order of the District Court requiring the defendant to deliver his property to the Trustee. In the course of the opinion, the Circuit Court of Appeals said at page 485:

> "In our opinion, the subdivisions of section 5 preceding subdivision 'h' mean that a partnership is a legal entity that may be adjudged a bankrupt, irrespec-

tive of an adjudication against any of its members; that it may be so adjudged either in a voluntary or an involuntary proceeding; that in an involuntary proceeding, where the act of bankruptcy charged does not involve insolvency of the partnership, and where there is an adjudication against the partnership only, probably nothing is involved but partnership assets; that in an involuntary proceedings, where the act of bankruptcy charged is one that does involve insolvency of the partnership, there can be no adjudication against the partnership, unless it and all its members are insolvent; and that in such a case, though the adjudication be against the partnership only, or against the partnership and some, but not all, of its members, the estates of all the members are drawn into the proceeding for administration. If section 5 be thus construed, a partnership, which has been adjudged a bankrupt on the ground that it has committed an act of bankruptcy involving insolvency, will be wound up in accordance with the equitable principles adopted by that section and by section 36 of the Act of 1867. Under the act of 1867, every member of a bankrupt partnership was compelled to deliver his individual property to the trustee of the partnership for administration. We find nothing in the present act that confers upon an unadjudicated member of a partnership, which has been adjudged a bankrupt on a ground involving insolvency, the right to withhold his individual property from such a trustee."

This Court affirmed the Circuit Court of Appeals in every particular, holding that the adjudication of a partnership bankrupt upon an involuntary petition necessarily required the finding that the individual partners as well as the partnership were insolvent, stating, "* * * we should infer from Section 5 clauses (c) through (g), that the as-

sumption of the Bankruptcy Act was that the partnership and individual estates both were to be administered, and that the only exception was that in (h), 'In the event of one or more, but not all, of the members of a partnership being adjudged bankrupt' * * *".

In its opinion, this Court disapproved the opinion of the majority of the Circuit Court of Appeals in the case of *In Re Bertenshaw,* (C. C. A. 8) 157 Fed. 363, in which it had been held that the Trustee of the partnership had no jurisdiction over the property of the individual partners, and it approved the opinion of the Circuit Court of Appeals in *Vaccaro vs. Security Bank* (C. C. A. 6) 103 Fed. 436, in which the conclusions were the same as those of the Supreme Court. The following cases illustrate the application of the doctrine announced in Francis vs. McNeal and in many of them orders were made upon the unadjudicated partners to turn over their assets to the Trustee. *Menke vs. Sunderman,* (C. C. A. 3) 186 Fed. 486; *Dickas v. Barnes,* (C. C. A. 6), 140 Fed. 849; *In Re Hurley Mercantile Co.,* (C. C. A. 5) 56 F. (2nd) 1023; *In Re Hansley & Adams* (D. C. Cal.) 228 Fed. 564; *In Re Stokes,* (D. C. Pa.) 106 Fed. 312; *In Re Meyer,* (C. C. A. 2) 98 Fed. 976; *In Re Sitnek,* (D. C. Pa.) 52 F. (2nd) 861.

In *Carter vs. Whisler,* (C. C. A. 8), 275 Fed. 743, a petition in bankruptcy was filed against the firm in Montana with service on one of the partners. The other partner was in Iowa and no service was made on him. The partnership was adjudicated bankrupt in the District Court in Montana and ancillary proceedings were brought by the trustee in the District Court of Iowa to compel the partner there to file schedules of his assets in the bankruptcy proceedings against the partnership. The Court held that personal service on the one partner gave the Court jurisdiction over all the partners and of the administration of the partnership and the individual property. The Court said at page 746:

"The Trustee in Bankruptcy by the adjudication became vested with the title to the bankrupt's property, wherever situated in the United States (citing cases). The adjudication of the firm a bankrupt *vested in the trustee title to the property of the individual partners,* as well as the firm property, notwithstanding the fact that some members of the firm were not adjudicated bankrupt. Francis v. McNeal, 228 U. S. 695, affirming 186 Fed. 481; Menke v. Sunderman, 186 Fed. 486; Abbott vs. Anderson, 265 Ill. 285, 106 N. E. 782; New Orleans A. Etc. Co. v. Guillory, 117 La. 821, 42 Southern 329; In re Latimer, (D. C.) 174 Fed. 824; Vaccuro v. Security Bank of Memphis, 103 Fed. 436; In re Samuels (D. C.) 207 Fed. 195".

In *Armstrong vs. Fisher* (C. C. A. 8), 224 Fed. 97, at page 99, the Court asked itself the question: "May a court of bankruptcy which has adjudged a partnership, composed of two members, and one of its members, bankrupt, draw to itself and administer the property of the other member, and require him to file a list of his individual creditors and a schedule of his assets?" The Court answered the question in the affirmative, held that the case is not covered by Section 5 (h) which applies only where the partnership is not adjudicated bankrupt but some, and not all, of the partners are adjudicated and also held that the failure of the individual partner who was not adjudicated to object to the administration of the partnership property in bankruptcy and himself to settle the partnership business, estops him from successfully claiming that his individual estate could not be drawn into and administered by the Bankruptcy Court.

III.

The lower Court based its decision of the question involved on the cases of *Liberty National Bank v. Bear,* 276 U. S. 215; *First National Bank of Herkimer v. Poland Union,* (C. C. A. 2) 109 Fed. (2nd) 54, and *Credito Y. Ahorro Ponceno v. Gorbia* (C. C. A. 1) 25 F. (2nd) 817. In doing so, the Court overlooked the fundamental difference between the case at bar and the cases relied upon. In the present case the alleged rights of the Respondent arose *after* the petition in bankruptcy was filed. In all of the cases relied upon by the Court below, the rights of the Respondent arose *before* the petition in bankruptcy was filed. Relief was denied to the Trustee in those cases because the preferences and fraudulent conveyances attacked were not made by the bankrupt partnership but by members of the firm who were not adjudicated bankrupt and were made *before* the bankruptcy proceedings against the partnership was commenced. In the case at bar, the deed of Martha L. Post to the Respondent was made four days after the bankruptcy petition was filed against the partnership. Clearly, cases involving transfers made before the bankruptcy of the partnership can have no application to a case involving a transfer made after the bankruptcy of the partnership. The decisions in the cases relied upon by the lower Court turned on the question whether a Trustee in bankruptcy of a partnership could avoid preference and fraudulent transfers made by a partner, under the provisions of Sections 60 and 67 of the Bankruptcy Act. In the case at bar, the petitioner does not rely on these provisions of the Bankruptcy Act but upon Sections 5 and 70 of the Act. In other words, this is a proceedings to remove a cloud upon the petitioner's title to property which vested in him upon the filing of the petition in bankruptcy and is not a suit to recover a preference or to avoid a fraudulent transfer, made before the filing of the petition.

IV.

Although in its decision in the case of Francis v. McNeal, this Court did not state in so many words that title to an unadjudicated partner's property passes to the trustee in bankruptcy of a partnership as of the date bankruptcy proceedings are commenced, we respectfully submit that the decision necessarily implied such doctrine and the decision has been accepted by the courts as authority for such doctrine. In Francis v. McNeal this Court held that a Trustee in bankruptcy of a partnership may compel a partner to surrender his individual property to the Trustee by *summary proceedings for a turnover order.* Summary proceedings for a turnover order are permissible only as to the property which comes into the custody, actual or constructive, of the bankruptcy court on the date when bankruptcy proceedings are commenced. 2 *Collier on Bankruptcy,* 14th Ed. 447 et seq. If, as was stated by the lower Court in the present case, the Trustee of a bankrupt partnership is entitled only to such of a partner's property as the partner may have at the time the Trustee seeks to recover such property, then clearly, turnover proceedings would not be a permissible remedy.

The lower Federal Courts have consistently upheld the summary jurisdiction of the Bankruptcy Court to order an unadjudicated partner to surrender his property to the trustee of the partnership for administration. In *In re Meyer, supra,* (C. C. A. 2) summary proceedings were upheld. In *In re Stokes, supra,* (D. C.), the same result was reached as to an assignee of an unadjudicated partner. In *Menke vs. Sunderman, supra,* (C. C. A. 3) it was held that a Bankruptcy Court may order sale of the individual property of a partner by the Trustee of a partnership without any prior proceedings to draw the property into the Bankruptcy Court for administration.

V.

In none of the cases which we have examined has the question as to the time when title to a partner's property vests in the Trustee of a partnership been directly at issue. As we have heretofore stated, the Courts, in the cases cited, have assumed that the partnership trustee's rights in a partner's property are the same as his rights in the property of the partnership. In none of the cases we have read has it been suggested that the rights of the partnership Trustee in the partner's property vest at a different time than his rights in the property of the partnership itself.

Section 70 of the Bankruptcy Act is the Section upon which reliance must be placed in all cases involving the question as to what property vests in the Trustee and as to when title vests in him.

Section 70 provides, inter alia, that the Trustee of the estate of a bankrupt shall be vested by operation of law as of the date he was adjudged a bankrupt to all, "(5) property which prior to the filing of the petition he could by any means have transferred or *which might have been levied upon and sold under judicial process against him.*"

It is respectfully submitted that this provision of the Bankruptcy Act establishes beyond question the contention of the petitioner in this case. Although a partnership could not voluntarily transfer the property of a partner, the property of a partner is subject to levy and sale under judicial process against the partnership. Whether property is subject to seizure and sale under judicial process must be determined by local law. *Hewit v. Berlin Machine Works,* 194 U. S. 296; *In re Butterwick* (D. C. Pa.) 131 Fed. 371; *In re Berry,* (D. C. Mich.) 247 Fed. 700. In Pennsylvania, where the real estate involved in this case is located, it is well settled that the property of a partner is

subject to seizure and sale for a debt of the partnership, provided the partner is named in the action against the partnership and served with process. *Walsh vs. Kirby,* 228 Pa. 194; *Hirsch v. Samulan,* 93 Pa. Super. Ct. 49; *Cummings's Appeal,* 25 Pa. 268; *Tonge v. Item Publishing Co.,* 244 Pa. 417; *Zwick v. West Park Cleaners & Dyers,* 98 Pa. Super. Ct. 498; *Harr vs. Dyer H. & Co.,* 30 Luz. L. R. (Pa.) 473 (1936).

It follows that to the extent that a partner's property could have been levied upon and sold under judicial process against the partnership, the partnership may be said to have had "title" to such property and under the provisions of Section 70, such title passes to the Trustee in bankruptcy of the partnership.

VI.

It is respectfully submitted that if the decision of the lower Court in this case is allowed to stand, a deliberate and purposeful fraud will be upheld and the law as to the administration of bankrupt partnerships will be thrown into confusion. The fraudulent nature of the transaction out of which this case arose is patent and is virtually undenied by the Respondent. Under the decision of the lower Court, a member of a bankrupt partnership might at any time before the Trustee actually takes control of his property, convey it away to a third person and such third person could retain it against the Trustee of the partnership.

Proper administration of bankrupt partnerships depends upon the ability of the Court to gather into the proceedings all the property liable for the debts of the partnership and of the individual partners. Otherwise, inequities as between creditors are bound to result. The

only effective way in which this result can be accomplished is to vest title to all such property in the Trustee of the partnership and adjust the rights of the various classes of creditors in the bankruptcy proceedings. This is what was contemplated by Congress in enacting Sections 5 and 70 and by this Court in *Francis v. McNeal, supra.*

CONCLUSION.

It is respectfully submitted that, for the reasons stated, this petition for a Writ of Certiorari should be granted.

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